IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GARY F. WEISHAAR,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C 01-3048-MWB

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO ALTER OR AMEND DISPOSITIVE ORDER AND PLAINTIFF'S APPLICATION FOR ATTORNEY FEES

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I. INTRODUCTION

This matter comes before the court pursuant to the defendant Commissioner's July 23, 2002, "Motion to Alter or Amend" this court's July 15, 2002, Memorandum Opinion and Order Regarding Magistrate Judge's Report and Recommendation, and presumably the judgment entered pursuant to that order. The motion is purportedly brought "in accordance with Federal Rule of Civil Procedure 60(b)." Defendant's Motion To Alter Or Amend, 1. The Commissioner contends that there are various errors in the court's findings, legal analysis, and disposition of plaintiff Gary F. Weishaar's action for judicial review of denial by an administrative law judge (ALJ) of Title II disability insurance (DI) benefits under the Social Security Act. The essence of the Commissioner's arguments—now, as on the merits—is that the ALJ posed an adequate hypothetical question to a vocational expert concerning Weishaar's credible limitations. Thus, the Commissioner contends, the ALJ's denial of benefits based on the vocational expert's opinion was a decision based on "substantial evidence," which must be sustained. Before resisting the Commissioner's so-called "Motion to Alter or Amend," Weishaar filed an application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, on September 5, 2002. The Commissioner resisted the attorney fee application as untimely on September 11, 2002, in light of the pending Motion to Alter or Amend. Weishaar then filed a belated resistance to the Commissioner's Motion to Alter or Amend on September 17, 2002. Although Weishaar offers no explanation therein for his long delay in resisting the Commissioner's motion, he does assert that there is no basis for the court to alter or amend its decision. On September 17, 2002, Weishaar also filed a request to withdraw his application for attorney fees without

prejudice, conceding that the application currently pending is premature.

II. LEGAL ANALYSIS

A. Authority For The Motion "To Alter Or Amend"

Although the Commissioner cites Rule 60(b) as the authority for her "Motion To Alter or Amend," and does not elsewhere identify any other applicable standards, it is Rule 59(e) of the Federal Rules of Civil Procedure, not Rule 60(b), that provides for motions "to alter or amend a judgment." *See* FED. R. CIV. P. 59(e). Rule 60(b), on the other hand, provides that "[o]n a motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding," for certain specified reasons and for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). Thus, Rule 60(b) only "authorizes relief based on certain enumerated circumstances (for example, fraud, changed conditions, and the like)."[1] *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996) ("Federal Rule of Civil Procedure 60(b) provides that the court may relieve a party from a final judgment for, among other reasons, mistake, inadvertence, surprise, or excusable neglect.").

Rule 60(b) "is not a vehicle for simple reargument on the merits." *Broadway*, 193 F.3d at 990. Thus, a "motion to reconsider" pursuant to Rule 60(b) is properly denied, for

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[1]The circumstances enumerated in Rule 60(b) are the following: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b).

example, where the movant "d[oes] nothing more than reargue, somewhat more fully, the merits of their claim." *Id.*; *Sanders v. Clemco Indus.*, 862 F.2d 161, 170 (8th Cir. 1988) (a Rule 60(b) motion may be denied where it raises only issues of law previously rejected by the court, because the failure to present reasons not previously considered by the court "'alone is a controlling factor against granting relief'") (quoting *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980)).

The first failings of the Commissioner's motion are obvious without reaching the merits of the motion. Those failings are that the Commissioner has failed to identify the proper authority for a motion "to alter or amend," *compare* FED. R. CIV. P. 59(e), *with* FED. R. CIV. P. 60(b); the Commissioner has failed to identify which of the enumerated grounds for relief under Rule 60(b) is the basis for its motion, *see Broadway*, 193 F.3d at 990; *MIF Realty L.P.*, 92 F.3d at 755; and the Commissioner appears to do little more than "reargue," perhaps "somewhat more fully," the merits of her objections to Judge Zoss's Report and Recommendation, recast as objections to the court's disposition of this action, because the Commissioner's motion reiterates the contention that the ALJ's hypothetical question adequately states the limitations that the ALJ found to be credible. *See Broadway*, 193 F.3d at 990. For these reasons, the Commissioner's motion could be, and hereby is, denied. Nevertheless, the court will also consider the *merits* of the Commissioner's misidentified "Motion to Alter or Amend" under the rule that the Commissioner offers as authority for her motion, Rule 60(b).

B. Merits Of The Commissioner's Motion

1. Rule 60(b) standards

Rule 60(b) "'provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.'" *Sanders*, 862 F.2d at 169 n.14 (quoting *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986) (*per curiam*), *cert. denied*, 484

U.S. 836 (1987)); *see also United States v. One Parcel of Property Located at Tracts 10 & 11 of Lakeview Heights*, 51 F.3d 117, 120 (8th Cir. 1995) ("A district court should grant a Rule 60(b) motion 'only upon an adequate showing of exceptional circumstances.'") (also quoting *Young*); *Mitchell v. Shalala*, 48 F.3d 1039 (8th Cir. 1995) ("Generally, Rule 60(b) provides for extraordinary relief, which may be granted only upon a showing of exceptional circumstances."); *Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367 (8th Cir. 1994) (also quoting *Young*); *Schultz v. Commerce First Fin.*, 24 F.3d 1023, 1024 (8th Cir. 1994) (also quoting *Young*); *Robinson v. Armontrout*, 8 F.3d 6 (8th Cir. 1993) (also quoting *Young*); *Reyher v. Champion Int'l Corp.*, 975 F.2d 483, 488 (8th Cir. 1992) (Rule 60(b) provides for extraordinary relief which may be granted only on adequate showing of exceptional circumstances). Because the Commissioner has failed to identify any of the enumerated grounds for relief under Rule 60(b), and only the sixth "catchall" ground enumerated in the Rule appears to this court to have any applicability to the Commissioner's contentions, the court concludes that the ground upon which the Commissioner's motion must stand or fall is the "catchall" ground for relief for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). The "exceptional circumstances" standard also applies to motions brought on this "catchall" ground. *Atkinson*, 43 F.3d at 373; *Schultz*, 24 F.3d at 1024; *In re Zimmerman*, 869 F.2d 1126, 1128 (8th Cir. 1989).

While relief under Rule 60(b) is "extraordinary," a Rule 60(b) motion is "committed to the sound discretion of the trial court." *MIF Realty, L.P. v. Rochester Asssociates*, 92 F.3d 752, 755 (8th Cir. 1996). As the Eighth Circuit Court of Appeals explained,

> Rule 60(b) is to be given a liberal construction so as to do substantial justice and "'to prevent the judgment from becoming a vehicle of injustice.'" *Id.* (quoting *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980)). This motion is grounded in equity and exists "to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light

> of all the facts." *Id.* (internal quotations omitted) (alterations in original). *See also* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2857, at 255 (2d ed. 1995) ("Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b).").

MIF Realty L.P., 92 F.3d at 755-56. Although Rule 60(b) motions are "disfavored," the Eighth Circuit Court of Appeals has also "recognize[d] that they 'serve a useful, proper and necessary purpose in maintaining the integrity of the trial process, and a trial court will be reversed where an abuse of discretion occurs.'" *Id.* at 755 (quoting *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984)). An "abuse of discretion" occurs "if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* (internal quotation marks omitted) (quoting *Hosna v. Groose*, 80 F.3d 298, 303 (8th Cir. 1996), *cert. denied*, 519 U.S. 860 (1996), in turn quoting *International Ass'n of Machinists & Aerospace Workers v. Soo Line R.R.*, 850 F.2d 368, 374 (8th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1010 (1989)).

2. Standard of review of Commissioner's denial of benefits

The Commissioner does not appear to dispute this court's statement of the "substantial evidence" standard of review of the Commissioner's denial of benefits. That statement was as follows:

> The Eighth Circuit Court of Appeals has described the applicable review as "narrow":
>
> > "We will affirm the ALJ's findings if supported by substantial evidence on the record as a whole." *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). "Substantial evidence is less than a preponderance, but enough that a reasonable mind might accept it as adequate to support a decision." *Id.* If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those

> positions represents the Commissioner's findings, the court must affirm the commissioner's decision. *See Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). Even if we would have weighed the evidence differently, we must affirm the denial of benefits if there is enough evidence to support the other side. *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992).
>
> *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001). Although this review is "narrow," the Eighth Circuit Court of Appeals has also explained that, "'[i]n reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ's decision.'" *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) ("'In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner's decision as well as evidence that supports it.'") (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted).

Order of July 15, 2002, at 3-4.

Nor does the Commissioner dispute this court's prior conclusion that "the key question in this case [is] the sufficiency of the ALJ's hypothetical question and the [vocational expert]'s response to satisfy the 'substantial evidence' standard," Order of July 15, 2002, at 4, or this court's statement of the specific standards for application of the "substantial evidence" standard to the sufficiency of the ALJ's hypothetical question. This court's statement of that standard was as follows:

> [T]he Eighth Circuit Court of Appeals recently explained as follows:
>
> > "A hypothetical question must precisely describe a claimant's impairments so that the vocational expert may accurately assess whether jobs exist for the claimant." *Newton v. Chater*, 92 F.3d 688, 694-95 (8th Cir. 1996). Testimony from a vocational expert based

> on a properly-phrased hypothetical constitutes substantial evidence. *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996). The converse is also true. *See Newton*, 92 F.3d at 695. However, "[w]hile the hypothetical question must set forth all the claimant's impairments, [citation omitted], it need not use specific diagnostic or symptomatic terms where other descriptive terms can adequately define the claimant's impairments." *Roe*, 92 F.3d at 676.
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> *Howard [v. Massanari]*, 255 F.3d [577,] 581-82 [(8th Cir. 2001)]; *accord Pearsall [v. Massanari]*, 274 F.3d [1211,] 1220 [(8th Cir. 2001)].

Order of July 15, 2002, at 4-5.

Although the Commissioner does not dispute this court's statement of the applicable standards, the Commissioner does argue that the court's ultimate determination, and the court's conclusions at various steps in the court's analysis, were erroneous. Therefore, the court will turn, first, to the Commissioner's specific arguments that the court should "alter or amend" its Order of July 15, 2002, and the judgment entered pursuant to that order.

3. Arguments of the parties

The Commissioner argues that, although this court "found" that borderline intellectual functioning, headaches, depression, somatoform disorder, and personality disorders "are diagnoses and not limitations or impairments," the court also found that "'the ALJ's hypothetical question is still deficient in that it fails to characterize properly the degree of these limitations in [Plaintiff's] case, as demonstrated by the record and the ALJ's own findings.'" Defendant's Motion To Alter Or Amend at 2 (quoting the court's July 15, 2002, order at 5). However, the Commissioner argues that the court "has not indicated exactly how the ALJ's hypothetical question is flawed." She also argues that the "'ALJ's own findings'" are consistent with the hypothetical question. Moreover, she argues that Weishaar never argued that the ALJ's credibility analysis was flawed, that the ALJ was only required to include in his hypothetical question those impairments that he found

were credible and supported by the record, and that the hypothetical question relied upon by the ALJ adequately reflected Weishaar's credible physical and mental impairments and sufficiently presented Weishaar's limitations to the vocational expert. *Id.*

In his belated resistance, Weishaar argues that no amendment or alteration of the court's order is required. Weishaar points out that the court did identify the deficiency in the ALJ's hypothetical question as failure to state adequately limitations arising from Weishaar's diagnosed mental conditions. He contends that the ALJ's statement of limitations in the hypothetical question does not accurately capture the concrete consequences of Weishaar's mental impairments. Weishaar also contends that the court correctly concluded, on *de novo* review, that there was sufficient evidence detracting from the ALJ's hypothetical question to make reversal appropriate. Finally, Weishaar contends that the Commissioner has now changed directions, without explanation, at first arguing for rejection of Judge Zoss's recommendation that this case be remanded for further consideration, but now arguing that the court should accept that recommendation instead of reversing the Commissioner outright.

4. The ALJ's hypothetical question

a. Identification of the flaw in the ALJ's hypothetical question

Contrary to the Commissioner's contention, this court *did not* "find" that borderline intellectual functioning, headaches, depression, somatoform disorder, and personality disorder are diagnoses and not limitations or impairments, as the Commissioner contends. Rather, the precise statement in the court's July 15, 2002, order was the following:

> It may be true, as the Commissioner contends, that borderline intellectual functioning, headaches, depression, somatoform disorder, and personality disorder are "diagnoses," not "limitations" or "impairments," but that is not the end of the matter here. Rather, implicit in Judge Zoss's conclusions, and readily apparent from *de novo* review of the record, is the absence of any adequate statement of limitations or

> impairments arising from Weishaar's mental conditions in the hypothetical question as framed by the ALJ.

Order of July 15, 2002, at 5. Thus, the court did not make the "finding" that the Commissioner reads into the quoted statement; rather, the court accepted, merely for the sake of argument, that the Commissioner's contention that certain mental disorders are "diagnoses," not "limitations" or "impairments," "may be true," but even accepting that uncertain contention as true, the court nevertheless concluded that the ALJ's hypothetical question was deficient.

The Commissioner's misreading of the court's order concerning this supposed "finding" is, unfortunately, consistent with other flaws in the remainder of her arguments in her present motion "to alter or amend." As the quoted portion of this court's ruling just above indicates, contrary to the Commissioner's contention, the court *did* "indicat[e] exactly how the ALJ's hypothetical question is flawed." The court expressly found that the ALJ's hypothetical question was flawed by "the absence of any adequate statement of limitations or impairments arising from Weishaar's mental conditions," *see* Order of July 15, 2002, at 5, and explained, further, that "the ALJ's hypothetical question is still deficient in that it fails to characterize properly the degree of these limitations in Weishaar's case, as demonstrated by the record and the ALJ's own findings." *Id.*

b. Deference to the ALJ's "credibility" determinations

The Commissioner's contentions that the ALJ's "credibility" determinations cannot be overturned are a red herring. The Commissioner is correct that Weishaar never argued that the ALJ's credibility findings regarding limitations were flawed and this court never held that the ALJ's credibility analysis was flawed. However, no such argument or conclusion was required, because the flaw in the hypothetical question posed by the ALJ was not that it failed to include limitations that the ALJ *should have found* to be credible, but that the ALJ simply left out limitations demonstrated by the record *and the ALJ's own*

findings.

c. Adequacy of the ALJ's hypothetical question

The Commissioner contends that the ALJ's hypothetical adequately stated all limitations that the ALJ found to be credible. The only portions of the ALJ's hypothetical question that relate to limitations resulting from Weishaar's mental disorders and borderline intellectual functions were the following:

> Claimant would need to be limited to simple routine tasks. [He] [s]hould have a job which would require limit [sic], no contact with the general public and limited contact with fellow workers.

Transcript at 77. Because it is, perhaps, a flaw in this court's prior ruling that the court did not specifically identify and quote the portions of the ALJ's own findings, including credibility determinations, that demonstrate the inadequacy of this characterization of Weishaar's limitations, the court will do so now.

i. The ALJ's own findings. First, in his written Decision, as to mental and intellectual impairments, the ALJ found as follows:

> Although [Weishaar] has a moderate restriction in activities of daily living, he is able to take care of his own grooming and hygiene, do some housekeeping chores (cleaning house and doing dishes), do some shopping, and drive 2 hours a day (Exhibit 7E). The claimant also has moderate difficulties in maintaining social functioning. The record indicates that he is moderately limited in the ability to accept instructions, respond appropriately to criticism from supervisors, and get along with co-workers or peers without distracting them or exhibiting behavioral extremes. Although the claimant related a history of violent outbursts, he has no criminal history or job actions due to these. The record also indicates that he is moderately limited in the ability to understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; and complete a normal workday and workweek without interruptions from psychologically based

> symptoms, and perform at a consistent pace without an unreasonable number and length of rest periods. Thus, he is rated as often having a deficiency in concentration, persistence or pace. The record indicates that he has once or twice had episodes of deterioration or decompensation in a work-like setting. Based on the totality of evidence, the undersigned finds that while the claimant's mental impairments are severe in nature, they do not satisfy the criteria of any of the disorders under Section 12.01 and, therefore, must be considered in assessing his residual functional capacity.

Transcript at 18-19 (ALJ's Decision at 7-8). As to residual functional capacity, the pertinent findings by the ALJ are the following:

> Considering these factors [as revealed by mental and physical residual functional capacity analyses], the undersigned finds that the claimant has functional limitations, but that the claimant's statements concerning his impairments and their impact on the ability to work are credible only to the extent they indicate an inability to engage in activity exceeding the residual functional capacity set forth below.
>
> Based on the testimony and the evidence, the undersigned finds that the claimant retains the residual functional capacity (RFC) to perform work which requires [the following limitations]. . . . In addition, the claimant could not perform work requiring detailed instruction, working with the general public, or work that was not simple, routine, repetitive, and non-stressful in nature. . . .

Transcript at 21-22 (ALJ's Decision at 10-11); *see also id*. at 25, ¶ 5 (ALJ's Decision at 14, ¶ 5).

ii. The hypothetical question. It should be readily apparent from this recitation of the ALJ's hypothetical question and the ALJ's own findings concerning Weishaar's mental and intellectual condition and their impact on his residual functional capacity that the ALJ's hypothetical question is fatally flawed. As this court found in its prior ruling, the ALJ's hypothetical question is flawed, because of "the absence of any adequate statement

of limitations or impairments arising from Weishaar's mental conditions," and the failure "to characterize properly the degree of these limitations in Weishaar's case," even *accepting* the ALJ's credibility determinations, and relying exclusively on limitations that the ALJ specifically found from the record. *See* Order of July 15, 2002, at 5. As this court also explained in its prior ruling—and concludes again here in response to essentially identical contentions in the motion "to alter or amend"—despite the Commissioner's valiant attempt to demonstrate, on the basis of case law, that the ALJ's references to certain limitations in the hypothetical question adequately addressed the limitations or impairments arising from particular mental conditions that the ALJ found credible, it just isn't so.

An attempt to encompass all of the limitations that the ALJ expressly found to be credible in the summary statement in the ALJ's hypothetical question that Weishaar should be restricted to "simple routine tasks," should have either "limited" or "no" contact with the general public, and "limited" contact with fellow workers, *see* Transcript at 77, patently fails. For example, there is no indication in the ALJ's hypothetical question of the following limitations that the ALJ found to be credible: (1) moderate limitation in the ability to accept instructions and respond appropriately to criticism from supervisors; (2) the impact of "a history of violent outbursts," which the ALJ did not reject, but instead observed had not resulted in a criminal history or job actions; (3) moderate limitation in ability to complete a normal workday and workweek without interruptions from psychologically based symptoms; (4) moderate limitation in ability to perform at a consistent pace without an unreasonable number and length of rest periods; and (5) episodes of deterioration or decompensation in a work-like setting. *See* Transcript at 19 (ALJ's Decision at 8). Nor is there any indication of a residual functional capacity that requires limitation to work that is "non-stressful in nature." *See id*. at 22 (ALJ's Decision at 11); *see also id*. at 25, ¶ 5 (ALJ's Decision at 14, ¶ 5).

Therefore, upon reconsideration, the court finds no "exceptional circumstances"

requiring any relief from the court's Order of July 15, 2002, and judgment pursuant to that order, because the court did not improperly conclude that the ALJ's hypothetical question failed to include all of the limitations that the ALJ had, himself, found credible. *See* FED. R. CIV. P. 60(b)(6) ("catchall" permitting relief from an order or judgment for "any other reason justifying relief from the operation of the judgment"); *see also Atkinson*, 43 F.3d at 373 (the "exceptional circumstances" standard also applies to motions brought pursuant to Rule 60(b)(6)); *Schultz*, 24 F.3d at 1024 (same); *In re Zimmerman*, 869 F.2d at 1128 (same).

iii. Detracting evidence. On the other hand, as this court pointed out in its prior ruling—and contrary to the Commissioner's present contentions—the evidence detracting from the ALJ's conclusion is Weishaar's counsel's hypothetical questions, which properly characterized Weishaar's limitations, and the vocational expert's conclusions, on the basis of such proper characterizations, that Weishaar would be precluded from employment. *See* Order of July 15, 2002, at 6 (citing Transcript at 78-80); *see also Hutsell*, 259 F.3d at 714 ("'[I]n reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ's decision.'") (quoting *Easter*, 867 F.2d at 1131). While there are glaring omissions from the ALJ's own hypothetical question of limitations that the ALJ had found credible, which led the vocational expert to opine that there were jobs from which Weishaar would not be precluded, the vocational expert opined that Weishaar would be precluded from employment on the basis of Weishaar's counsel's hypothetical questions properly incorporating, for example, a "slow" pace and "[p]eriodic deficiencies in concentration and ability to stay on task at least once per hour," *see* Transcript at 78-79, and "periodic outburst[s] of anger or temper such that an individual would leave the work sight [sic] without permission on a monthly basis and not return." *Id.* at 80; *and compare id.* at 18-19 (ALJ's Decision at 7-8), *id.* at 21-22 (ALJ's Decision at 10-11), & *id.* at 25, ¶ 5 (ALJ's

Decision at 14, ¶ 5).

The Commissioner's contentions do not warrant relief from the July 15, 2002, order or the judgment entered pursuant to that order under the "exceptional circumstances" standards of Rule 60(b)(6), because the court did not improperly conclude that there was substantial evidence detracting from the sufficiency of the ALJ's hypothetical question. *See* FED. R. CIV. P. 60(b)(6) ("catchall" permitting relief from an order or judgment for "any other reason justifying relief from the operation of the judgment"); *see also Atkinson*, 43 F.3d at 373 (the "exceptional circumstances" standard also applies to motions brought pursuant to Rule 60(b)(6)); *Schultz*, 24 F.3d at 1024 (same); *In re Zimmerman*, 869 F.2d at 1128 (same). Therefore, that part of the Commissioner's motion "to alter or amend" challenging the merits of the court's review of the ALJ's hypothetical question will be denied.

5. Remand or reversal

Finally, the Commissioner contends that, if the ALJ's hypothetical question was somehow deficient, the court should have remanded the case to the Commissioner for further proceedings, rather than outright reversing the Commissioner's decision. The court did not—and does not now—dispute that *ordinarily*, a remand might be appropriate on the basis of a flawed hypothetical question. However, the court explained why such a course was not appropriate in this case:

> Indeed, even giving the ALJ's findings due deference, this court concludes that the evidence presented by the [vocational expert]'s conclusions on the basis of a properly-formulated hypothetical [question] is so clear that there is no reason to prolong this case by remanding for further administrative proceedings, as Judge Zoss recommends. Instead, as in *Hutsell v. Massanari*, 259 F.3d 707 (8th Cir. 2001), "[t]he clear weight of the evidence points to the conclusion that [Weishaar] is disabled." *See Hutsell*, 259 F.3d at 714 (also reaching this conclusion after considering evidence

> that detracted from the ALJ's findings). "'Where further hearings would merely delay receipt of benefits, an order granting benefits is appropriate.'" *Id.* (quoting *Parsons v. Heckler*, 739 F.2d 1334, 1341 (8th Cir. 1984)). That is the case here. Accordingly, the decision of the Commissioner will be reversed and this matter remanded to the Commissioner only for the purpose of awarding benefits. *Id.*

Order of July 15, 2002, at 6-7.

The court finds no "exceptional circumstances" for relieving the Commissioner from this part of the court's order and disposition. *See* FED. R. CIV. P. 60(b)(6) ("catchall" permitting relief from an order or judgment for "any other reason justifying relief from the operation of the judgment"); *see also Atkinson*, 43 F.3d at 373 (the "exceptional circumstances" standard also applies to motions brought pursuant to Rule 60(b)(6)); *Schultz*, 24 F.3d at 1024 (same); *In re Zimmerman*, 869 F.2d at 1128 (same). Rather, the court reaffirms it conclusion that reversal of the Commissioner's decision and a remand only for the purpose of awarding benefits is the appropriate course in this case.[2]

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[2]The court does not find that the results would be different, even if it were to apply the standards applicable to a motion pursuant to Rule 59(e), the rule that actually provides for motions "to alter or amend," as the Commissioner's motion has been denominated. *See* FED. R. CIV. P. 59(e). The language of Rule 59(e) provides only a deadline for motions "to alter or amend," without specifying the standards for alteration or amendment. *Id.* Because the Commissioner's motion was timely under Rule 59(e), it is not necessarily eliminated from consideration as the authority for the Commissioner's motion. *See Arnold v. Wood*, 238 F.3d 992, 998 (8th Cir. 2001), , *cert. denied*, ___ U.S. ___, 122 S. Ct. 400 (2001); *Garrett v. United States*, 195 F.3d 1032, 1033 (8th Cir. 1999). The Eighth Circuit Court of Appeals has filled in the substantive standards for a motion to "alter or amend" pursuant to Rule 59(e). Under Rule 59(e), the court may alter or amend its judgment only if it finds a "manifest" error of law or fact in its ruling. *See Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir.) (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended,* 835 F.2d 710 (7th Cir. 1987), quoting in turn *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1983), *aff'd,* (continued…)

C. The Plaintiff's Fee Application

One further matter must be addressed at this time. The plaintiff's counsel has applied for attorney fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and the Commissioner has resisted that application as untimely. In her resistance, the Commissioner contends that her motion "to alter or amend" tolled the time for appeal, and consequently, tolled the time for any fee application. Therefore, the Commissioner contends that the fee application is premature. On September 17, 2002, plaintiff's counsel conceded that the pending attorney fee application is premature, and requested leave to withdraw the attorney fee application without prejudice.

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[2](…continued)

736 F.2d 388 (7th Cir. 1984)), *cert. denied*, 488 U.S. 820 (1988). More specifically,

> Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment. *Norman [v. Arkansas Dep't of Educ.]*, 79 F.3d [748,] 750 [(8th Cir. 1996)] (citing *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)). Rule 59(e) motions serve a limited function of correcting "'manifest errors of law or fact or to present newly discovered evidence.'" *Hagerman*, 839 F.2d at 414 (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), *as amended*, 835 F.2d 710 (7th Cir. 1987)). Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. *Id.*

Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998). Denial of a Rule 59(e) motion is reviewed for abuse of discretion and the district court abuses its discretion, for example, when it makes an error of law or an erroneous factual finding. *See Computrol, Inc. v. Newtrend, L.P.*, 203 F.3d 1064, 1070 (8th Cir. 2000); *Roark v. City of Hazen, Ark.*, 189 F.3d 758, 761 (8th Cir. 1999). However, for the same reasons the court found no "exceptional circumstances" requiring relief pursuant to Rule 60(b), it also finds no "manifest error" of either law or fact requiring it to "alter or amend" the judgment in this case.

The court notes that the EAJA permits an award of attorney fees to a prevailing party if application for such fees is made within thirty days of a "final judgment," and the court notes, further, that a "final judgment" is defined as "a judgment that is final and not appealable." *See* 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). Moreover, the Commissioner's motion "to alter or amend," whether pursuant to Rule 59(e) or Rule 60(b), which was filed within ten days of the order and judgment that it challenges, was a timely "tolling" motion, tolling the time for any appeal by the Commissioner. *See* FED. R. APP. P. 4(a)(4); *see also United States v. Duke*, 50 F.3d 571, 574 (8th Cir.), *cert. denied*, 516 U.S. 885 (1995). Therefore, the time for appeal will not begin to run until this court enters the present ruling, and the plaintiff's application for attorney fees is, consequently, premature. Under the circumstances, the court agrees with the parties that it is appropriate to deny the pending attorney fee application without prejudice as premature.

III. CONCLUSION

For the reasons stated above, the Commissioner's July 23, 2002, "Motion to Alter or Amend" this court's July 15, 2002, Memorandum Opinion and Order Regarding Magistrate Judge's Report and Recommendation and the judgment entered pursuant to that order is **denied**. The plaintiff's September 5, 2002, application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, is **denied as premature**, without

prejudice to reassertion at the proper time.

IT IS SO ORDERED.

DATED this 17th day of September, 2002.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA